No. 09-133

In The

Supreme Court of the United States

RONALD W. MORTERS,

Petitioner,

v.

CHARLES H. BARR and
TIG INSURANCE COMPANY,

Respondents.

On Petition For Writ Of Certiorari
To The Wisconsin Court Of Appeals, District I

PETITION FOR REHEARING

RONALD W. MORTERS
Petitioner, Pro Se
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(262) 544-4355

QUESTIONS PRESENTED

I. Did the United States Supreme Court's denial of Ronald W. Morters' petition for writ of certiorari which presented the questions denoted below as Nos. II and III create a constitutional conflict between the Court's jurisdiction as defined by Article III, Sec. 2, of the Constitution and 28 U.S.C. § 1257(a) and the fundamental rights of access to due process and to petition for redress of grievances established by the First, Fifth, and Fourteenth Amendments, and cause a Supremacy Clause problem?

II. Did the Wisconsin Court of Appeals' failure to conduct a de novo review of the legal error in this case in accordance with established case law standards and the Wisconsin Supreme Court's failure to rectify this error violate Ronald W. Morters' rights to due process of law and equal protection of law as guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Sec. 1, of the Wisconsin Constitution?

III. Did the Wisconsin Supreme Court's use of the discretionary review process to avoid reviewing the constitutional violation therein violate the Supremacy Clause of the United States Constitution?

LIST OF PARTIES

The caption of this petition identifies all of the parties who have participated in both the trial court and appellate proceedings in this case. Shannon L. Morters was also a plaintiff in the consolidated actions, but she has not participated in any appellate proceedings because no fee assessment was made against her. The Morters' attorney, Robert F. Sutton, did not appeal from the fee assessment against him. Because this petition involves a deprivation of Fourteenth Amendment rights and a violation of the Supremacy Clause by the Wisconsin courts, copies of this petition have been forwarded to the Attorney General for the State of Wisconsin. Furthermore because this petition raises a question as to the constitutionality of 28 U.S.C. § 1257(a) due to the denial of certiorari herein, copies of this petition have been forwarded to the Solicitor General of the United States. As indicated in the Jurisdiction section, notification has been made as required by Supreme Court Rule 29.4(b) and (c).

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 44.2, the Petitioner, Ronald W. Morters, prays that the Court grant a rehearing of the Order denying his Petition for Writ of Certiorari which was entered on October 13, 2009 in Case No. 09-133.

OPINIONS BELOW

The order of the Wisconsin Supreme Court dated May 13, 2009 denying the Petition for Review is unpublished and reprinted in the Appendix ("App.") to Mr. Morters' Petition for Writ of Certiorari at H1-2. The decision of the Wisconsin Court of Appeals, District I, dated January 21, 2009, is unpublished and reprinted in the Appendix at A1-6. The Order denying Mr. Morters' Petition for Writ of Certiorari is reported at the U.S. Supreme Court Website at http://www.supremecourtus.gov in the October 13, 2009 Orders List, and the Clerk of the United States Supreme Court's letter reciting the Court's Order is reprinted in the Rehearing Appendix ("R. App.") at A1.

JURISDICTION

The decision of the Wisconsin Court of Appeals, District I, was entered on January 21, 2009. A timely

Petition for Review of said decision was denied by the Wisconsin Supreme Court in an order entered on May 13, 2009 thereby affirming the Court of Appeals' decision and exhausting all state judicial remedies. The petition for writ of certiorari was filed within 90 days of the Wisconsin Supreme Court's order denying review. The United States Supreme Court has jurisdiction to review the order of the Wisconsin Supreme Court and the decision of the Wisconsin Court of Appeals pursuant to 28 U.S.C. § 1257(a). This petition for rehearing was filed within 25 days of the Supreme Court's order denying the petition for writ of certiorari and is therefore timely under Supreme Court Rule 44.2.

Rule 29.4(c) Statement

Because this petition draws into question the constitutionality of Wisconsin's discretionary review statutes, Mr. Morters hereby provides notice in compliance with Supreme Court Rule 29.4(c) that 28 U.S.C. § 2403(b) may apply. Accordingly, copies of this petition have been served on the Attorney General for the State of Wisconsin.

Rule 29.4(b) Statement

Because this petition questions the constitutionality of 28 U.S.C. § 1257(a) when certiorari is denied in a case where access to due process has been denied by a state court, Mr. Morters hereby provides notice in compliance with Supreme Court Rule

29.4(b) that 28 U.S.C. § 2403(a) may apply. Accordingly, copies of this petition have been served on the Solicitor General of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved in this case are as follows: Section 1 of the Fourteenth Amendment; the First Amendment; the Fifth Amendment; Article III, Sec. 2, paragraph 2; and Article VI, paragraph 2. These provisions are set forth at App. I1-3 in the Appendix to the Petition for Writ of Certiorari. 28 U.S.C. § 1257(a) is involved and is set forth at App. I1. This case also involves Article I, Secs. 1 and 9, and Article VII, Secs. 3(2), 3(3), and 5(3) of the Wisconsin Constitution which are reproduced at App. I4-5. The state statutes involved are Wisconsin Statutes, Secs. 806.07(1)(h), 808.03(1), 808.10, and 809.62(1m) & (1r) which are set forth at App. I5-8. United States Supreme Court Rule 10 is also involved and is reprinted at R. App. B1-2.

STATEMENT OF THE CASE

For a complete recitation of the facts of this case, Mr. Morters respectfully directs this Court to the Statement of the Case contained in his Petition for Writ of Certiorari.

REASONS FOR GRANTING OF THE PETITION FOR REHEARING

A. Introduction

According to Rule 44.2, the grounds for the rehearing of an order denying a petition for writ of certiorari shall be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. Mr. Morters believes that the Supreme Court's denial of certiorari in this case has given rise to other substantial grounds not previously presented by him which require a rehearing.

B. Other Substantial Grounds

In Section I of his Petition for Certiorari, Mr. Morters argued that the Wisconsin Court of Appeals' failure to conduct a de novo review of the legal error in accordance with established case law standards and the Wisconsin Supreme Court's failure to rectify this error violated his rights to due process of law and equal protection of law as guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Sec. 1, of the Wisconsin Constitution. (Petition, p. 11-33) In conjunction with its supervisory role discussed in *Chandler v. Florida*, 449 U.S. 560, 570, 101 S. Ct. 802, 66 L. Ed. 2d 740 (1981), Mr. Morters urged the Court to grant certiorari to remedy such violation. (Petition, p. 17-20) Because this case involved a denial of access to due process, Morters believed the situation required strict scrutiny by the

Court. (Petition, p. 19-20) In Section II of his Petition, Mr. Morters argued that the Wisconsin Supreme Court's use of the discretionary review process to avoid reviewing the due process deprivation in this case violated the Supremacy Clause of the United States Constitution.

By denying certiorari in this due process "access denial" case, the Supreme Court has created a constitutional conflict between the Court's jurisdiction under Article III, Sec. 2, and 28 U.S.C. § 1257(a) and the fundamental rights to due process of law set forth in the Fifth and Fourteenth Amendments and to petition for the redress of grievances provided by the First Amendment. On page 20 of his Petition, Mr. Morters warned that if certiorari is not granted in cases where the denial of access to procedure is readily apparent, Congress by virtue of the jurisdiction given to the Court pursuant to Article III, Sec. 2, is essentially making a law which abridges the right to seek redress of grievances in the judicial forum and denies due process. *The constitutional conflict created by the denial of certiorari has now made this concern a reality.*

The denial of certiorari has also presented a serious Supremacy Clause problem since the Court's exercise of discretionary jurisdiction supersedes the rights given by the First, Fifth, and Fourteenth Amendments. Finally, this denial of certiorari has exposed a serious flaw in the certiorari criteria set forth in Rule 10. Thus, the Court's decision has

created other substantial grounds not previously presented which require a rehearing.

The right of access to a particular process is a fundamental right which can be seen in a number of different contexts. As discussed on page 20 of Morters' Petition, a fair trial in a fair tribunal is a basic requirement of due process. *Weiss v. United States*, 510 U.S. 163, 178, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1984) and *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955). The Supreme Court recently reaffirmed this principle in *Caperton v. A. T. Massey Coal Co.*, 556 U.S. ___, 129 S. Ct. 2252, 2259, 173 L. Ed. 2d 1208 (2009).

Other situations not previously discussed demonstrate the importance of access to process in our legal system. The Sixth Amendment guarantees access to a jury trial in criminal cases, while the Seventh Amendment preserves such right in certain civil cases. Trial by jury has been described as a "fundamental liberty". See *Lecates v. Justice of Peace Court 4 of State of Del.*, 637 F. 2d 898, 909 (3rd Cir. 1980). The Fifteenth and Nineteenth Amendments guarantee access to the voting process. In *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966), the Court noted that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.

The Court is currently considering a case involving access to the political airwaves and free speech in *Citizens United v. Federal Election Commission*, Docket No. 08-205. Concern about providing access to the federal courts was recently expressed by the Chairman of the Senate Judiciary Committee, Senator Patrick Leahy, in a letter published in the October 15, 2009 edition of *The Wall Street Journal* which addressed his efforts to meet the needs of the federal judiciary. Senator Leahy commented that "Congress should neither delay nor deny justice to Americans seeking access to their courts." (Sec. A, p. 16, col. 4, lines 78-81) *Because access to process is such a fundamental right, cases involving the denial of access require strict scrutiny to remedy such violations.*

It is well established that it is the duty of the Supreme Court to act as the ultimate interpreter of the Constitution. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803), Chief Justice Marshall stated that "*[i]t is emphatically the province and duty of the judicial department to say what the law is.*" (Emphasis added) According to *Cooper v. Aaron*, 358 U.S. 1, 18, 78 S. Ct. 1401, 3 L. Ed. 2d 5 (1958), the interpretation of the Fourteenth Amendment by the Supreme Court is the supreme law of the land. In *Baker v. Carr*, 369 U.S. 186, 211, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962), Justice Brennan referred to the responsibility of the Court as the ultimate interpreter of the Constitution. Citing *Marbury* and *Baker*, the Court in *Powell v.*

McCormack, 395 U.S. 486, 549, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969), stated that " . . . it is the responsibility of this Court to act as the ultimate interpreter of the Constitution." In *United States v. Nixon*, 418 U.S. 683, 705, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974), the Court reaffirmed *Marbury*'s holding that *it is the province and duty of the Supreme Court to say what the law is.*

Given that the access rights under the First, Fifth, and Fourteenth Amendment are phrased in *mandatory* terms, *the Constitution requires the enforcement of these rights*. Pursuant to the constitutional oath taken in accordance with Article VI of the Constitution and 5 U.S.C. § 3331, the Court *must support and defend* the Constitution. The judicial oath set forth in 28 U.S.C. § 453 *requires* the Court to perform all duties under the Constitution and laws of the United States. There is no greater duty than the protection of fundamental rights of access to process guaranteed by the Constitution, and the Court's oaths make such protection mandatory.

In light of the Court's duty as the ultimate interpreter of the Constitution and the need to avoid constitutional conflict between the Court's Article III jurisdiction and the constitutional rights afforded under the First, Fifth, and Fourteenth Amendments, *the Supreme Court must grant certiorari* in cases where access to due process is denied. Only by exercising its discretion in such a manner can constitutional consistency be maintained between the Court's jurisdiction and constitutional rights. Such action will

eliminate Supremacy Clause problems since constitutional rights of access to due process will not be subordinate to the Court's constitutional jurisdiction.

The foregoing approach finds support from the following passage in the *Marbury* opinion:

> "It is also not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States, generally, but those only which shall be made in *pursuance* of the constitution, have that rank." [Emphasis added]
> *Marbury*, 5 U.S. at 180.

Since the Constitution and only those laws made in pursuance thereof are supreme, the discretionary jurisdiction given pursuant to § 1257(a) must be exercised in accordance with, and not in conflict with, the Constitution. Otherwise, § 1257(a) becomes a law at odds with the Constitution.

The denial of certiorari in this case has exposed a serious flaw in the considerations under Rule 10[1] which govern review on certiorari. Pursuant to 28 U.S.C. § 2071(a), Congress gave the Supreme Court the power to prescribe rules for the conduct of its business. Noticeably absent from the criteria created is any mention of the Constitution or due process of law.

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[1] Rule 10 is set forth at R. App. B1-2.

Since the protection of access to due process is vital, it is inconceivable why the criteria do not include such matter or make any reference to the protection of constitutional rights. The criteria do not reflect the Court's responsibility as the ultimate guardian of constitutional rights and thus represent an underlying cause of the conflict between the Court's discretionary jurisdiction and the rights given under the First, Fifth, and Fourteenth Amendments. By granting this petition, the Court can effectively remedy this conflict through a decision which adds a criterion providing that certiorari will be granted where a state or federal court has decided a case in a manner which has denied access to an established constitutional standard of trial court or appellate due process.

The Court has previously stated that the denial of certiorari does not import any expression of its views as to the merits of the case or whether the case was correctly decided. See for example, *United States v. Carver*, 260 U.S. 482, 490, 43 S. Ct. 181, 67 L. Ed. 361 (1923); and *Teague v. Lane*, 489 U.S. 288, 296, 109 S. Ct. 1060, 108 L. Ed. 2d 334 (1989). Where a certiorari petition which presents a question as to the sufficiency or quality of due process is denied, it would be difficult for the lower courts to infer any views by the Supreme Court as to the merits. There may be a reasoned debate as to whether the process afforded was sufficient, or the decision may be supportable on other grounds. Because due process access denial cases tend to be "either/or" propositions,

however, *the Court should be greatly concerned that its failure to grant certiorari in access denial situations will be interpreted by the lower courts as approvals of such conduct.*

Certiorari denials in access deprivation cases resemble summary dispositions of appeals based on insubstantiality of federal question grounds which occurred in cases prior to the 1988 jurisdictional revision. Such dispositions were interpreted as decisions on the merits according to *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247, 79 S. Ct. 978, 3 L. Ed. 2d 1200 (1959). In this litigation, the Wisconsin Supreme Court obviously interpreted the Court's previous denials of certiorari as acquiescence in those denials of access to due process at the trial court and appellate levels. (See discussion as outlined on pages 30 through 33 of his Petition for Certiorari.)

In a Supreme Court order in *Flynn v. United States*, 75 S. Ct. 285, 286, 99 L. Ed. 1298 (1955), Justice Frankfurter indicated that a petition for rehearing is part of the appellate procedure authorized by the Supreme Court Rules *and should not be treated as an empty formality.* The conflict herein between the due process rights guaranteed by the Fourteenth Amendment and the exercise of the Court's discretion is far from a formality. Similarly, the denial of certiorari is at odds with the rights guaranteed by the First and Fifth Amendments. These are very real constitutional conflicts which require a rehearing.

The Court in *Rice v. Sioux City Cemetery*, 349 U.S. 70, 73, 75 S. Ct. 614, 99 L. Ed. 897 (1955) indicated that there must be "special and important reasons" for the granting of certiorari. *Nothing can be more important than maintaining the supremacy of the entire Constitution and insuring that one provision does not triumph over another. Rice* also warned that the Court should avoid the decision of constitutional issues unless avoidance becomes evasion. *Rice*, 349 U.S. at 74. The failure to grant a rehearing in this case would constitute an evasion of a real constitutional conflict. As the ultimate arbiter of the Constitution, it is the Court's responsibility to resolve such matters and insure that the lower courts are diligent in protecting such constitutional rights.

CONCLUSION

In a letter to Horace Greeley, President Abraham Lincoln stated "I shall try to correct errors when shown to be errors." See *Bartlett's Familiar Quotations*, p. 475, 17th Edition (2002). Given the Court's substantial workload,[2] it is not possible to correct all errors. However, constitutional conflicts and Supremacy Clause problems simply must be rectified since the Constitution is the supreme law of the land. This

[2] According to The Justices' Caseload at the Supreme Court Website (www.supremecourtus.gov) more than 10,000 cases are on the docket each term.

Petition for Rehearing has demonstrated a constitutional conflict between the Court's constitutional jurisdiction and the rights of access set forth in the First, Fifth, and Fourteenth Amendments thereby resulting in a Supremacy Clause dilemma. Mr. Morters has identified a serious flaw in the certiorari criterion listed in Rule 10 and has demonstrated the need for a new criterion covering the deprivation of access to due process. This petition clearly sets forth substantial grounds not previously presented which require a rehearing.

Since the *Wisconsin courts* originally *failed in their responsibility* to insure access to due process, the United States Supreme Court as the ultimate guardian of the Constitution must now remedy the violation of this right. By doing so, the Court can resolve the constitutional conflict and Supremacy Clause problems and enunciate a new criterion for certiorari review which emphasizes *the importance of providing access to an existing standard of procedural due process*. A decision reminding the lower courts of their constitutional responsibilities will ultimately reduce the Court's workload. For the reasons set forth in this Petition, Ronald W. Morters' Petition for Rehearing of the Order denying his Petition for Writ of Certiorari should be granted, and it is respectfully requested that the Court grant this Petition for Rehearing.

Dated this 2nd day of November, 2009.

Respectfully submitted,

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SUPREME COURT RULE 44 CERTIFICATE

I hereby certify to this Honorable Court that the reasons for seeking this Petition for Rehearing are limited to other substantial grounds not previously presented and that this Petition is being promptly presented in good faith and not for delay.

RONALD W. MORTERS
Petitioner, Pro Se

REHEARING APPENDIX A

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

October 13, 2009

Mr. Leonard W. Schulz
W230 S8775 Clark Street
P.O. Box 238
Big Bend, WI 53103

Re: Ronald W. Morters
v. Charles H. Barr, et al.
No. 09-133

Dear Mr. Schulz:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

REHEARING APPENDIX B

Rule 10. Consideration Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.